

# EXHIBIT 7

To  
Memorandum In Support of TriPath Imaging, Inc.'s Motion to Exclude  
Defenses Based on Cytac's CDS-1000

Civil Action No. 03-11142 [DPW] - Lead Case

Filed May 5, 2005



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March 30, 2005

**VIA FACSIMILE & U.S. MAIL**

Lisa J. Pirozzolo, Esq.  
Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, MA 02109

Re: ***Cytec Corporation v. TriPath Imaging, Inc.***  
**Civil Action No. 03-11142 (DPW)**  
**U.S.D.C. – District of Massachusetts**

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Dear Lisa:

We have now had an opportunity to review Cytec's expert reports and I am writing to you regarding improper matters contained therein. In particular, in the reports of Dr. Trevor Jackson Darrell and Dr. Kenneth Castleman, Cytec asserts that it had a product known as the CDS-1000 that invalidates, either by anticipation or obviousness, certain claims of the '327 and '377 patents, respectively.

Cytec failed to disclose these theories of invalidity in a timely fashion and they must be withdrawn. TriPath served an introductory at the beginning of fact discovery (on November 10, 2003) requiring Cytec to provide "a detailed description of any and all prior art upon which any claim of invalidity or unenforceability is based." Cytec never disclosed in its interrogatory responses any claim that the CDS-1000 workstation rendered any claims of the '327 or '377 patents invalid under any theory until Cytec served, on the last day of fact discovery (January 31, 2005), Plaintiff's Second Set of Objections and Supplemental Answers to Defendant's First Set of Interrogatories (Nos. 5 and 6). Even that the document was not faxed to us until just before midnight on January 31, well after the close of business on the last day of fact discovery. Thus, TriPath had no notice during the fact discovery period that the CDS-1000 would be relied upon to support an invalidity argument.

Cytec noted the impropriety of its own conduct in Patrick Callahan's March 16, 2005 letter to me – "The rules preclude [Cytec] from asserting – after the close of fact discovery – claims that were not disclosed in its answer to interrogatories." Cytec cannot wait until midnight of the last day of a fourteen-month discovery period to allege new theories of invalidity.

Cytec's untimely assertions of invalidity based on the CDS-1000 are therefore subject to exclusion if they are not withdrawn. We also note that Cytec waited until the last few weeks of the fact discovery period to produce most of its documents relating to CDS-1000 that are now being relied upon in the expert reports. This was done despite the fact that TriPath served document requests at the beginning of the fact discovery period (on November 20, 2003) demanding the production of all documents concerning any prior art or other allegedly invalidating matter. Thus, not only did Cytec fail to reveal until the close of fact discovery that the CDS-1000 would be relied upon to support an invalidity argument, but Cytec also denied TriPath the evidence needed to test Cytec's undisclosed theories throughout the majority of the fact discovery period.

There is plainly no justification for Cytec's conduct. The CDS-1000 is a project that Cytec worked on in the early 1990's and Cytec obviously has been aware of any invalidity arguments raised by the CDS-1000 (and Cytec has had possession of all documents underlying such an invalidity claim) since it filed suit for a declaratory judgment of patent invalidity on June 16, 2003. Cytec clearly engaged in a litigation strategy to keep this information from TriPath until a point where TriPath could conduct no discovery on the issue. Cytec's conduct has substantially prejudiced TriPath in that TriPath was unable to undertake the significant amount of discovery that would be necessary on the legal and factual bases underlying Cytec's allegations of invalidity by the CDS-1000.

In view of the foregoing, we demand that Cytec agree to withdraw all claims that the CDS-1000 invalidates, or constitutes prior art, to the '327 or '377 patents. Please let me know promptly, and in any event not later than April 6, if Cytec will agree to withdraw these claims.

Sincerely,

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC



Charles A. Burke

WILMER CUTLER PICKERING  
HALE AND DORR LLP

April 1, 2005

Patricia M. Callahan

*By Facsimile and First Class Mail*

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Re: Cytoc Corporation v. TriPath Imaging, Inc. No. 03-11142 (DPW) (D. Mass.)

Dear Charles:

Cytoc will not withdraw its claims that the CDS1000 constitutes prior art rendering the '377 and '327 patents invalid.

First, Cytoc disclosed information relating to the CDS1000 before the close of fact discovery. Your suggestion that it is somehow improper to serve supplemental interrogatory responses on the last day of fact discovery overlooks the fact that TriPath served its own supplemental responses on that same day (after the close of business). See TriPath's January 31, 2005 Supplemental Answers to Cytoc's First and Second Set of Interrogatories (Nos. 1, 2, 6 and 7) and TriPath's January 31, 2005 Supplemental Answers to Cytoc's Third Set of Interrogatories (No. 11).

Second, TriPath had ample opportunity to take fact discovery relating to the CDS1000. As you will recall, we wrote to you three weeks before the close of fact discovery to inform you that we had recently located the code for the CDS1000, and that we were producing a CD containing the readable code that day. See Pirozzolo January 10, 2005 Letter. To ensure that TriPath had every opportunity to take the necessary discovery, we suggested that TriPath postpone the depositions of certain Cytoc witnesses "to afford [TriPath] a reasonable opportunity to review the code." Id. TriPath took advantage of this opportunity and conducted numerous depositions after receiving the CDS1000 code. Those deposed included Kam Lin Wong and David Zahnisar -- the two witnesses most knowledgeable about Cytoc's work in connection with the CDS1000. Indeed, TriPath asked Ms. Wong numerous questions relating the CDS1000 during her January 27th deposition.

Third, your statement that Cytoc has "clearly engaged in a litigation strategy to keep [the CDS1000] information from TriPath until a point where TriPath could conduct no discovery on the issue" is incorrect. As Lisa's January 10th letter made clear, we produced the CDS1000 information to you as soon as we located it. In this regard, we note that TriPath's request that Cytoc withdraw its assertions regarding the CDS1000 rings hollow in light of TriPath's assertion

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April 1, 2005

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of two additional patent claims shortly before the close of fact discovery (and after Cytoc produced the code underlying the CDS1000). See TriPath's January 18, 2005 Supplemental Answers to Cytoc's Second Set of Interrogatories (No. 9).

For all these reasons, Cytoc will not withdraw its invalidity assertions relative to the CDS1000.

Very truly yours,



Patrick M. Callahan

PMC/jlm